

REMARKS

Applicant has carefully studied the outstanding Official Action mailed on January 21, 2009. This response is intended to be fully responsive to all points of rejection raised by the Examiner and is believed to place the application in condition for allowance. Favorable reconsideration and allowance of the application are respectfully requested.

Claims 1, 2, 5, 6, 8-13 and 15-19 stand rejected under 35 USC §102(b) as being anticipated by Globerman et al. (US 7097648).

Claim 7 stands rejected under 35 USC §103(a) as being unpatentable over Globerman et al. in view of Brumfield et al. (US 6235028).

Claim 3 stands rejected under 35 USC §103(a) as being unpatentable over Globerman et al. in view of McNamara et al. (US 5147370).

Claim 4 stands rejected under 35 USC §103(a) as being unpatentable over Globerman et al. in view of Reiley et al. (US 6248110).

Claim 14 stands rejected under 35 USC §103(a) as being unpatentable over Globerman et al. in view of Scholten et al. (US 4969888).

Examiner says Globerman et al. discloses “an elastomeric sheath (20; col. 10, lines 19-26)”. Applicant respectfully traverses this statement. The passage in Globerman et al. is “Alternatively or additionally, it is noted that the spacer, in some preferred embodiments of the invention, may be made flexible along its main axis, at least in its un-expanded configuration and especially as a result of the slits formed therein. Thus, the spacer can be provided at inter-vertebral space 55 using a curved guide, possibly a bendable guide, such as an endoscope. Alternatively, if the spacer is formed of a shape-memory material, the spacer may be cooled below the temperature at which it turns ductile, so that it can be easily bent. Alternatively or additionally, and especially if the spacer is elastic or super-elastic, the spacer may be maintained in a curved configuration during insertion using a curved stylet inserted through the spacer, alternatively or additionally to using a curved outer tube.”

Examiner interprets “the spacer is elastic or super-elastic” as meaning the spacer is made of an elastomer. This is respectfully not the case. As is well known in the art, an elastomer is a polymer with the property of elasticity and is derived from “elastic polymer”. Globerman et al. never says the spacer is made from an elastomer. Metal can be elastic (like the shape memory alloy Globerman et al. mentions). Indeed, the European PCT examiner for the identical sister PCT application, PCT/IL2004/000674, realized the significance of this and clearly stated that the instant claims are novel and non-obviousness in light of the exact

Application No. 10/565,205

same Globerman et al. because Globerman et al. does not teach an elastomeric sheath (please see the written opinion submitted herewith).

Claim 8 has been amended to state the ends of the rod are fastened together.

Accordingly all of the rejections are deemed overcome and claims 1-19 are deemed allowable.

Applicant respectfully requests that a timely Notice of Allowance be issued in this case.

Respectfully submitted,

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